MOKHTAR AMIN

v.

OMAR MAT ZIKI

HIGH COURT MALAYA, MELAKA
AUGUSTINE PAUL J
[CIVIL SUIT NO: 22-7-97]
13 APRIL 1998

CIVIL PROCEDURE: *Default judgment - Setting aside - Action for specific relief - Failure to enter appearance and file defence - Summons for judgment - Proper procedure - Failure to proceed under O. 13 r. 6(1) read with O. 19 r. 7(1) of RHC - Whether a fundamental breach - Whether entry of default judgment thereof irregular – Whether could be set aside ex debito justitiae - Rules of the High Court 1980, O. 2 r. 1, O. 13 r. 6(1), O. 19 r. 7(1), O. 42 r. 13, O. 81 r. 2(1)*

CIVIL PROCEDURE: *Judgments and orders - Irregular judgment - Setting aside - Time for setting aside a defective judgment - Lapse of time - Whether no bar to application to set aside - Order 42 r. 13 Rules of the High Court 1980 - Applicability*

CIVIL PROCEDURE: *Judgments and orders - Irregularity - Order for assessment of damages - Plaintiff obtaining order to assess damages without first obtaining order for damages - Whether wrong in law - Whether beyond curability*

The plaintiff herein had filed an action for specific relief against the defendant. Although duly served the defendant did not enter appearance and the plaintiff thereupon filed a summons for judgment and the supporting affidavit therefor. The plaintiff's summons did not state the particular rule of court which it sought to invoke, and so, did not identify the nature of the judgment sought for. That notwithstanding, the court granted judgment to the plaintiff when the defendant was absent at the hearing of the summons, and ordered *inter alia* that damages be assessed against the defendant ('the Order of Court').

Dissatisfied, the defendant applied to set aside the Order of Court. Before the learned judge, the defendant argued that the judgment, having been obtained in default of appearance under O. 13 Rules of the High Court 1980 ('RHC'), and not in default of defence under O. 19 RHC as it should have been, was defective in law. According to the defendant, the use of the words "dan tanpa kehadiran defendan" in the Order of Court could only mean that the judgment obtained was one for default of appearance, and was therefore irregular. These aside, the defendant also argued that the Order of Court was invalid as the plaintiff had obtained an order to assess damages without first obtaining an order for damages.

The plaintiff contended that the Order of Court was properly obtained, being a judgment in default of defence obtained under O. 13 r. 6(1) read with O. 19 r. 7(1) RHC. The plaintiff also argued (i) that the defendant was wrong in the stand he took in respect of the words "dan tanpa kehadiran defendan" in the Order of Court, as those words referred to the absence of the defendant at the hearing of the summons, and did not therefore mean that the judgment obtained was one for default of appearance; and (ii) that the order in respect of assessment of damages was in accordance with the summons and the writ, and was therefore regular.

Held:

[1] An order obtained to assess damages without first obtaining an order for damages is wrong in law. There can be no assessment of damages in the absence of an order granting damages.The order obtained by the plaintiff in such terms is therefore clearly wrong in law and beyond curability.

[2] The words "dan tanpa kehadiran defendan" do not support the stand taken by the defendant. As correctly submitted by the plaintiff, the words merely mean that judgment was given on the summons in the absence of the defendant.

[3] Order 13 RHC deals with the entry of a judgment in default of appearance to the writ. It will however be observed that, in cases falling within O. 13 r. 6(1), there can be no judgment in default of appearance. And thus, even when no appearance had been entered, the plaintiff has to proceed with the action as if the defendant has entered appearance, and if the defendant does not serve a defence, the plaintiff will have to apply for judgment in default of defence.

[3a] The philosophy underlying O. 13 r. 6(1) RHC is that specific relief is, by its very nature, discretionary. A defendant may not decide to defend the action, but that does not relieve the plaintiff from delivering his statement of claim and satisfying the court, upon an application for judgment, that the case is a fit one for the grant of specific relief. Conversely, a defendant who has not entered appearance is not precluded from contending, at the hearing of the application for judgment, that the particular case is one in which discretion should be exercised against the plaintiff and that specific relief ought to be denied.

[3b] Order 19 RHC, on the other hand, deals with the procedure to be followed where there is a default in the service of pleadings. Thus, where no appearance has been entered and no defence has been filed in an action claiming specific relief, the plaintiff must apply for judgment, if he so desires, under O. 19 r. 7(1) RHC.

[4] It ought to be noted that in a summons for judgment under O. 19 r. 7(1) RHC the court cannot receive evidence and must give judgment according to the pleadings. The plaintiff's summons, however, was accompanied by an affidavit and it was quite evident that the judgment was in fact based on the affidavit. That being so, the summons does not appear to be one made under this rule. On the other hand, the filing of the affidavit coupled with the statement therein that the defendant has no defence to the action seems to indicate that the application comes within O.81 r. 2(1) RHC. And yet, at another end, the fact that an affidavit proving due service of the writ and a Certificate of Non-Appearance had been filed seems to indicate that the application is one for judgment in default of appearance under to O. 13 RHC.

[4a] It follows that, in this case, it is possible for the Order of Court to fall within any of the three rules, namely, O. 13, O. 19 r. 7(1) and O. 81 r. 2(1) of the RHC. Yet it does not strictly comply with any one of them. Therefore, it cannot be said with a reasonable degree of certainty that the default judgment was obtained pursuant to O. 19 r. 7(1) RHC. The Order of Court, in the circumstances, suffers from a fundamental defect.

[5] Any irregularity in the entry of a default judgment will entitle the defendant *ex debito justitiae* to have it set aside and O. 2 r. 1 will not apply to such a judgment. This defect, coupled with the judgment obtained for damages to be assessed without first having obtained a judgment for damages, renders the judgment irregular and incurable. The defendant therefore is entitled *ex debitio justitiae* to have the Order of Court set aside.

[6] Lapse of time is no bar to an application to set aside a defective judgment. Thus, the time limit laid down in O. 42 r. 13 RHC does not apply where an application is made to set aside such a judgment.

Obiter:

[1] The confusion relating to the appropriate provision of the RHC pursuant to which the plaintiff filed his summons for judgment could have been avoided if the summons had identified the nature of the judgment sought.

[Defendant's application allowed with costs.]

Cases referred to:

Badiaddin bin Mohd Mahidin v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(foll)***
Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 ***(refd)***
Eu Finance Bhd v. Lim Yoke Foo [1982] 2 MLJ 37 ***(foll)***
Ho Yoke Kwei & Anor v. Ong Eng Hin [1997] 1 CLJ 603 ***(refd)***
Jones v. Harris [1887] 55 LT 884 ***(refd)***
Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 ***(foll)***
Lam Kong Co Ltd v. Thong Guan & Co Pte Ltd [1985] 1 CLJ 412 ***(refd)***
Muniandy a/l Thamba Kaundan & Anor v. D & C Bank Bhd [1996] 2 CLJ 586 ***(refd)***
Shell Malaysia Trading Sdn Bhd v. Leong Yuet Yeng & Ors [1990] 3 MLJ 254 ***(foll)***
Smith v. Buchan [1888] 58 LT 710 ***(refd)***
Syarikat Joo Seng & Anor v. Habib Bank Ltd [1986] 2 MLJ 129 ***(foll)***
Webster v. Vincent [1898] 77 LT 167 ***(refd)***
Young v. Thomas [1892] 2 Ch 135 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 2 r. 1(1), O. 10 r. 1(2), O. 13 r. 6(1), O. 19 r. 7(1), O. 42 r. 13, O. 62 r. 1(3), O. 81 r. 2(1)
Rules of the Supreme Court 1957, O. 13 r. 12

For the plaintiff - Azad Bashir Abdul Kariem (Thangaraj with him); M/s Bashir & Co
For the defendant - Soon Tuan Siew (FHD Cruz with him); M/s Rohani, Soon & Assoc

Reported by WA Sharif

JUDGMENT

Augustine Paul J:

The claim by the plaintiff against the defendant in this case is based on a sale and purchase agreement entered into between them on 3 April 1991 pursuant to which he had agreed to purchase from the defendant all those pieces of land known as lots no 1089 and 1090 GMPP no 402 and 403, Mukim Ujong Pasir, Melaka at a price of RM2.5 million. The plaintiff alleged that the defendant had breached the agreement and prayed for an order, *inter alia*, for specific performance, rectification, declaration, injunction and damages. The writ of summons was served on the defendant by AR registered post on 8 March 1997 and the affidavit of service was filed on 2 April 1997. As the defendant did not enter any appearance a Certificate of Non Appearance was filed by the plaintiff on 2 April 1997. This was followed by the filing of a summons for judgment by the plaintiff on 11 April 1997. As the propriety of this summons is of considerable significance it is necessary to reproduce its material parts which read as follows:

Benarkan semua pihak yang berkenaan hadir di hadapan Hakim (atau Pendaftar) dalam Kamar pada hari Selasa pada 06 haribulan Mei 1997 pukul 9.00 pagi untuk memperdengarkan permohonan di pihak Plaintif untuk suatu perintah:-

1) Suatu deklarasi bahawa tempoh yang dinyatakan diperenggan 3 perjanjian bertarikh 3hb April 1991 yang dibuat diantara Plaintif dan Defendan tidaklah penting dan Plaintif hanya perlu mengambil langkah atau mengemukakan pelan bangunannya dalam tempoh yang munasabah iaitu dalam tempoh 3 bulan dari tarikh penerimaan surat permintaan bayaran premium dari pihak berkuasa mengenai tanah Lot 1089 dan 1090 GMPP 402 & 403, Mukim Ujong Pasir, Melaka.

2) Bahawa tempoh yang dinyatakan diperenggan 3 perjanjian bertarikh 3hb April 1991 dibetulkan supaya ianya mengandungi niat sebenar kedua-dua pihak pada masa perjanjian tersebut dibuat bahawa pelan bangunan hanya perlu dikemukakan oleh Plaintif kepada pihak berkuasa dalam tempoh 3 bulan atau secepat mungkin selepas dari tarikh kelulusan pelan tataatur (Layout Pelan) dan setelah bayaran premiumnya dibuat.

3) Deklarasi bahawa perjanjian jual beli yang dibuat pada 3hb April 1991 diantara plaintiff dan Defendan mengenai tanah Lot 1089 dan 1090 GMPP 402 & 403, Mukim Ujong Pasir, Melaka adalah sah dan masih wujud dan Plaintif berhak untuk menguatkuasakannya.

4) Pelaksanakan spesifik perjanjian jual beli tersebut seperti diperbetulkan.

5) Plaintif diberi kebebasan untuk mengeluarkan saman untuk arahan bagi tujuan melaksanakan perintah ini.

6) Injuksi menghalang defendan sendiri, pekerja, ejen atau selainnya ditahan dan dihalang daripada melaksanakan pindahmilik atau menguruskan tanah tersebut secara apa jua kepada sesiapa jua atau badan.

7) Defendan diperintahkan menyerah dan menghantar Suratan Hakmilik asal bagi tanah tersebut kepada Plaintif dengan serta merta.

8) Ganti rugi ditaksirkan oleh Timbalan atau Penolong Kanan Pendaftar Mahkamah yang mulia ini dan dibayar oleh Defendan kepada Plaintif.

9) Faedah keatas jumlah gantirugi pada kadar 8% setahun dari tarikh penghakiman ini sehingga tarikh bayaran dan dibayar oleh Defendan kepada Plaintif.

10) Kos tindakan dan permohonan ini dibayar oleh Defendan kepada Plaintif.

11) Lain-lain relif.

The summons was supported by an affidavit affirmed by the plaintiff. The affidavit narrated the sequence of events that transpired in this case. Paragraph 4 of the affidavit to which I will make reference in a later part of the judgment reads as follows:

Saya diberitahu oleh Peguamcara saya dan sesungguhnya percaya dan mengatakan bahawa Defendan tidak memasuki kehadiran dan Peguamcara saya telah memfailkan Perakuan Ketakhadiran pada 2hb April 1997. Saya juga mengatakan bahawa Defendan tidak mempunyai pembelaan terhadap tuntutan saya.

The summons together with the affidavit in support of it was served on the defendant on 23 April 1997 and the affidavit of service was filed on 12 May 1997. On 13 May 1997 when the summons was called up for hearing the defendant was not present and judgment was entered for the plaintiff. The material parts of the order of court (hereinafter referred to as the "order of courts") read as follows:

Atas Notis Permohonan Plaintif secara Saman Dalam Kamar (Lampiran 7) bertarikh 11hb. April 1997 dan setelah mendengar Encik Ravinathan s/o Muthiah, Peguamcara bagi Plaintif dan tanpa kehadiran Defendan walaupun Saman tersebut telah diserahkan serta diberitahu oleh Mahkamah melalui surat bertarikh 3hb Mei 1997 dan setelah membaca Afidavit Plaintif yang diikrar oleh Plaintif pada 9hb April 1997.

ADALAH DIPERINTAHKAN seperti berikut:-

1) Suatu deklarasi bahawa tempoh yang dinyatakan diperenggan 3 perjanjian bertarikh 3hb April 1991 yang dibuat diantara Plaintif dan Defendan tidaklah penting dan Plaintif hanya perlu mengambil langkah atau mengemukakan pelan bangunannya dalam tempoh yang munasabah ia itu dalam tempoh 3 bulan dari tarikh penerimaan surat permintaan bayaran premium dari pihak berkuasa mengenai tanah Lot 1089 dan 1090 GMPP 402 & 403, Mukim Ujong Pasir, Melaka.

2) Bahawa tempoh yang dinyatakan diperenggan 3 perjanjian bertarikh 3hb April 1991 dibetulkan supaya ianya mengandungi niat sebenar kedua-dua pihak pada masa perjanjian tersebut dibuat bahawa pelan bangunan hanya perlu dikemukakan oleh Plaintif kepada pihak berkuasa dalam tempoh 3 bulan atau secepat mungkin selepas dari tarikh kelulusan pelan tataatur (Layout Pelan) dan setelah bayaran premiumnya dibuat.

3) Deklarasi bahawa perjanjian jual beli yang dibuat pada 3hb April 1991 diantara Plaintif dan Defendan mengenai tanah Lot 1089 dan 1090 GMPP 402 & 403, Mukim Ujong Pasir, Melaka adalah sah dan masih wujud dan Plaintif berhak untuk menguatkuasakannya.

4) Pelaksanakan spesifik perjanjian jual beli tersebut seperti diperbetulkan.

5) Plaintif diberi kebebasan untuk mengeluarkan Saman untuk arahan bagi tujuan melaksanakan perintah ini.

6) Injuksi menghalang Defendan sendiri, pekerja, ejen atau selainnya ditahan dan dihalang daripada melaksanakan pindahmilik atau menguruskan tanah tersebut secara apa juga kepada sesiapa juga atau badan.

7) Defendan diperintahkan menyerah dan menghantar Suratan Hakmilik asal bagi tanah tersebut kepada Plaintif dengan serta merta.

8) Ganti rugi ditaksirkan oleh Timbalan atau Penolong Kanan Pendaftar Mahkamah yang mulia ini dan dibayar oleh Defendan kepada Plaintif.

9) Faedah keatas jumlah gantirugi pada kadar 8% setahun dari tarikh penghakiman ini sehingga tarikh bayaran dan dibayar oleh Defendan kepada Plaintif.

10) Kos tindakan dan permohonan ini dibayar oleh Defendan kepada Plaintif.

On 16 June 1997 a copy of the order of court was served on the solicitors for the defendant. On 17 June 1997 the defendant made an application to set aside the order of court. The plaintiff filed and served an affidavit-in-reply. On 9 July 1997 the defendant withdrew this application and filed it afresh on 29 July 1997 together with an affidavit in support. The plaintiff filed two affidavits-in-reply on 11 August 1997 and 19 August 1997 respectively.

When the defendant's application came up for hearing before me both parties agreed that its outcome is dependent on answers to the following issues:

(a) whether the affidavit in support of the application is regular;

(b) whether the documents which were served on the defendant ought to have been served on his solicitors in accordance with O. 62 r. 13 of the Rules of the High Court 1980;

(c) whether the withdrawal of the application dated 17 June 1997 precludes the filing of the application afresh by the operation of the doctrine of *res judicata*; and

(d) whether the 30 day rule to set aside a judgment stipulated in O. 42 r. 13 of the Rules of the High Court 1980 applies to an irregular judgment.

The Rules of the High Court 1980 shall hereafter be referred to as the "RHC".

In my opinion the issues raised by the parties are anchored on the validity of the order of court obtained by the plaintiff. If the order of court is not valid then the issues raised by the parties may cease to have any relevance. An appreciation of the law relating to the effect of an irregular judgment will therefore be useful before considering the validity of the order of court.

Where a judgment obtained by a party is irregular it may be set aside *ex debito justitiae*. In *Badiaddin bin Mohd Mahidin v. Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 Mohd Azmi FCJ in saying that such orders may be set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court without the need to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity added at p. 409,

It is of course settled law as laid down by the Federal Court in *Hock Hua Bank's* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.'

The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 at p. 39 provides the correct guideline on the subject:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon - in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p. 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside.'

For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention would be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised

judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order unless the aggrieved party could bring himself within the special exception.

It is necessary, in the light of the facts of this case, to determine the extent to which non-compliance with the RHC will render an order so obtained liable to be set aside *ex debito justitiae*. In *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565 Mohd Azmi FCJ said that although under O. 2 r. 1(1) of the RHC non-compliance with the rules of procedure is to be regarded as a mere irregularity and not a nullity, the court must exercise its discretion to cure such procedural irregularity on correct principles. His Lordship then said at p. 575,

On the basis of the above principle, the discretion available to this Court to cure irregularities under O. 2 r. 1(1) of the RHC read together with s. 69(4) of the Courts of Judicature Act 1964 (the equivalent of the English O. 59 r. 10(3)) and as well as s 101 of the same Act which allows this Court to discount 'any error, defect or irregularity whether in the decision or otherwise, not affecting the merits or the jurisdiction of the Court', should only be undertaken by the Court in the absence of prejudice. Thus defects affecting merits or the jurisdiction of the Court ought not to be cured, in the exercise of the discretionary power.

Applying the above principles to the facts of these appeals, it is clear that the default judgment (the subject matter of the first appeal) is irregular for non-compliance with the RHC, in particular O. 13 r. 6(1), by failing to serve a statement of claim on the defendants. On this ground alone, the learned judge was correct in setting aside the default judgment. There can be no dispute that the procedural irregularity in the failure to serve the statement of claim on the defendants before the default judgment was entered, just as the order to assess damages in the absence of judgment granting damages, had prejudiced the defendants and therefore beyond curability.

In the same case Gopal Sri Ram JCA said at p. 578,

Any proceeding commenced, or any order or judgment obtained, in breach of a rule of court is always subject to the curative power of the court available under O. 2 r. 1 of the Rules of the High Court 1980 ('the RHC'). Whether a particular proceeding should be cured is, of course, a matter of discretion for the court whose assistance is prayed in aid to effect the cure. It is wrong to assume that the court is obliged in every case to overlook the breach of a rule of court. For that would mean that a litigant may honour the Rules of the High Court more by breach than by observance. This is certainly not the law.

> The proper approach is for a court to accept that a breach of a rule of court renders the particular proceeding irregular with a power in the court to excuse the non-compliance. That power, as in all matters for curial discretion, is to be exercised judicially having regard to the substantive merits of a case and having particular regard to the interests of justice. Thus, for example, to say that a judgment entered for too much is automatically bad or is automatically curable is to take an extreme position that is unsustainable in law. Such a judgment may be set aside if to cure it by amendment would do greater injustice to the particular defendant. On the other hand, such a judgment may be cured by amendment if not to do thus would result in greater injustice to the plaintiff. Ultimately, it is the objective perception of a court as to where the justice in a particular case lies that determines whether the irregularity should be cured. If the court decides the particular case to be unfit for the exercise of the curative power, then it may set aside the judgment, order or other proceeding.

His Lordship then referred to *Lam Kong Co Ltd v. Thong Guan & Co Pte Ltd* [1985] 2 MLJ 429 where the Federal Court held that a breach of O. 13 r. 12 of the Rules of the Supreme Court 1957 (similar to O. 13 r. 6(1) of the RHC) is a fundamental defect and not curable. In commenting on that case his Lordship said at p. 581,

> The proposition that is to be gathered from the decision in Lam Kong is this. A judgment in default of appearance entered by a plaintiff, or, for that matter, a counter-claiming defendant, in breach of the terms of O. 13 r. 6(1), may be set aside *ex debito justitae.* And on an application of the proposition to the facts of the instant appeal, there is no doubt whatsoever that the judgment in default obtained in the present case was fundamentally flawed.

I had the occasion to consider the power of the court to rectify an irregularity in *Ho Yoke Kwei & Anor v. Ong Eng Hin* [1997] 1 CLJ 603 and had this to say at pp. 617 - 618,

> It is therefore clear that pursuant to O. 2 r. 1(1) of the SCR the old distinction between nullities and irregularities has ceased to exist. However, in accordance with O. 2 r. 1(2) of the SCR the discretion is still with the court to decide whether it will exercise the powers entrusted to it to remedy an irregularity. Judicial activism has placed some guidelines on the exercise of that discretion. Lord Denning MR himself said in the Harkness decision that an omission or mistake should be rectified - "… so long as it can do so without injustice." Cumming-Bruce LJ in considering the way in which the court should exercise its discretion to rectify an irregularity said in *Metroinvest Anstalt v. Commercial Union* [1985] 2 All ER 318 at p. 324:

> I would say that in most cases the way in which the court exercises its powers under O. 2 r. 1(2) is likely to depend on whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe O. 2 r. 1(2) as being so framed as to give the Court the widest possible power in order to do justice.

On the same issue Wee Chong Jin CJ said in *The Official Receiver, Liquidator of Jason Textile Industries Pte Ltd v. OBG Insurance (International) Ltd* [1989] 1 MLJ 1 at p. 3:

> It follows that if the non-renewal of the writ is an irregularity that can be cured under O. 2 r. 1, the next question is as to the exercise of the court's discretion whether or not to cure such irregularity. In this respect, the principle is clear that the court's power to cure an irregularity under O. 2 r. 1, in the first place, can only be exercised if the court could have properly granted the order for which there was a failure to apply, had there also been an application made pursuant to the relevant provision in the rules. In other words, the power in O. 2 r. 1 to cure irregularities is subject to the same principles which govern an ordinary application made under the relevant rule.

In *Bernstein & Anor v. Jackson & Ors* [1982] 2 All ER 806 it was held that where the irregularity sought to be cured amounted to a fundamental defect in the proceedings then the court should not exercise its discretion under O. 2 r. 1 to rectify it. In adopting this case Thean J said in the *Kuah Kok Kim* decision at 134:

> Notwithstanding the very wide powers given to court to remedy non-compliance with the Rules of Supreme Court 1970 there may be failure or non-compliance with the rules which is so fundamental or serious that the court ought not to exercise its discretion under r. 1 to remedy it.

What I have said thusfar means that where the irregularity sought to be cured amounts to a fundamental defect in the proceedings then the court should not exercise its discretion to rectify it. It has been held that a judgment in default which is wrongfully entered into under the rules is a substantive defect and not a mere procedural defect which may be cured (see *Shell Malaysia Trading Sdn Bhd v. Leong Yuet Yeng & Ors* [1990] 3 MLJ 254). The entry of such a judgment will entitle the defendant *ex debito justitiae* to have it set aside and O. 2 r. 1 of the RHC does not apply to such a judgment. These principles were enunciated by the (then) Supreme Court in *Syarikat Joo Seng & Anor v. Habib Bank Ltd* [1986] 2 MLJ 129 where Seah SCJ in delivering the judgment of the court said at pp. 130-131:

> In *Anlaby & Ors v. Praetorius* [1888] 20 QBD 764 it was held that where a plaintiff has obtained judgment irregularly, the defendant it entitled *ex debito justitiae* to have such judgment set aside. This case was considered by the Privy Council in *Mac Foy v. United Africa Co Ltd* [1962] AC 152 and by the Court of Appeal in *White v. Weston* [1968] 2 All ER 842. We would adopt this guideline in exercising the discretion contained in O. 19 r. 9. To quote Lord *Guest in Ratnam v. Cumarasamy & Anor* [1965] 1 MLJ 228, 229: 'The Rules of Court must *prima facie* be obeyed.' A fortiori, when the rules regulate how a default judgment may be obtained or given. There are good grounds why that shall be so, because the entry of judgment is a serious matter, leading to the issue of execution and possibly bankruptcy proceedings.

And further down at p 131,

> As the respondent had no right to enter a judgment in default of defence under Order 19 rule 7(1) without the leave of the Court or a Judge and adopting the construction laid down in *Anlaby* case, we are perforced to hold that Order 2 rule 1 of the Rules of the High Court 1980 does not apply to a default judgment or one obtained contrary to Order 19 rule 7(1) thereof.

In substance the submission of learned counsel for the defendant was that the order of court is defective as it had been obtained in default of appearance under O. 13 of the RHC when it should have been one for default of defence under O. 19 of the RHC. I shall pause for a moment and consider briefly the nature and effect of these two rules. Order 13 of the RHC deals with the entry of a judgment in default of appearance to the writ. Rule 6(1) of the Order, which deals with the entry of a judgment not coming within rr. 1 to 5, reads as follows:

> Where a writ is indorsed with a claim of a description not mentioned in rules 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered on appearance.

It will therefore be observed that in cases falling within O. 13 r. 6(1) of the RHC there can be no judgment in default of appearance. Even when no appearance has been entered the plaintiff will have to proceed with the action as if the defendant had entered an appearance. If the defendant does not serve a defence then the plaintiff will have to apply for judgment in default of defence. The philosophy underlying O. 13 r. 6(1) of the RHC is that specific relief is, by its very nature, discretionary. A defendant may well decide not to defend an action in which such relief is claimed in the honest belief that he has no defence upon the question of liability. But that does not relieve the plaintiff from delivering his statement of claim and satisfying the court,

upon an application for judgment, that the case is a fit one for the grant of specific relief. Therefore, a defendant who has failed to enter an appearance to an action for specific relief is not precluded from contending at the hearing of the application for judgment that the particular case is one in which discretion should be exercised against the plaintiff and that specific relief ought to be denied. The rule exists to preserve the discretion of the court in actions for specific relief despite the non-appearance of the defendant (see *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 2 MLJ 565). Order 19 of the RHC deals with the procedure to be followed where there is a default in the service of pleadings. Rule 7(1) of the Order reads as follows:

> Where the Plaintiff makes against a defendant or defendants a claim of a description not mentioned in rules 1 to 5, then, if the defendant or all the defendants (where there is more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, apply to the Court for judgment, and on hearing of the application the Court shall give such judgment as the plaintiff appears entitled on his statement of claim.

Thus where no appearance has been entered and no defence has been filed in an action claiming specific relief the plaintiff must apply for judgment, if he so desires, under O. 19 r. 7(1) of the RHC.

Learned counsel for the defendant said that as the plaintiff is claiming specific relief and the defendant has not entered appearance nor filed his defence he ought to have proceeded under O. 13 r. 6(1) read with O. 19 r. 7(1) of the RHC to obtain judgment. In support of his argument he referred to the order of court extracted by the Plaintiff which contains the following words:

> ... dan tanpa kehadiran Defendan walaupun saman tersebut telah diserahkan …

He said that the use of the words "... tanpa kehadiran …" mean that the judgment obtained is one for default of appearance and is therefore irregular. Learned counsel also said that the order of court is not valid as the plaintiff has obtained an order to assess damages without first having obtained an order for damages. The relevant part of the order of court reads as follows:

> Gantirugi ditaksirkan oleh Timbalan atau Penolong Kanan Pendaftar Mahkamah yang mulia ini dan dibayar oleh Defendant kepada Plaintiff.

In his reply learned counsel for the plaintiff contended that the order of court he obtained is indeed a judgment in default of defence as required by O. 13 r. 6(1) read with O. 19 r. 7(1) of the RHC. He said that the words in the order of court "… dan tanpa kehadiran defendan walaupun saman tersebut telah diserahkan …." refer to the absence of the defendant at the hearing of the

summons for judgment and that they do not mean that the judgment is one for default of appearance. With regard to the defendant's objection that he had obtained relief for assessment of damages before obtaining an order for damages learned counsel said in his written submission that this is "…. incorrect as a clear reading of Summons in Chambers (encl. J) will show that the plaintiff did in fact pray for damages to be assessed which is based on the Writ where there is a prayer for damages and other reliefs." Thus, according to learned counsel for the plaintiff, the order of court is in accordance with his summons and the writ.

The arguments of both counsel reveal that there are two issues to be addressed with regard to the validity of the order of court. They are -

(i) whether the order obtained to assess damages without first obtaining an order for damages is correct in law; and

(ii) whether the judgment obtained is in default of appearance or in default of defence.

I shall now deal with the two issues.

(i) Whether the order obtained to assess damages without first obtaining an order for damages is correct in law;

A judgment obtained in this form is wrong in law. A problem of this nature was encountered by the Federal Court in *Lai Yoke Ngan* where Gopal Sri Ram JCA said at pp. 582 - 583,

> The next question that arises is whether the learned judge was right in reversing the order he made in chambers and in setting aside the whole of the judgment, when the summons before him sought to set aside only so much of the judgment that directed the assessment of damages. I think that he was.
>
> This is a case in which the plaintiffs had absolutely no right whatsoever to obtain an order for the assessment of damages. There was, as earlier observed, no judgment for damages against the defendants on 28 November 1991. It is elementary law that there can be no assessment of damages in the absence of a judgment granting damages. Such a judgment did not come until 2 December 1991. So, here is a case where the cart had been squarely placed before the horse. The judgment for the assessment of damages was found in a judgment which was flawed in other respects. The learned judge was therefore perfectly entitled, in the interests of justice, to take cognisance of the breach of O. 13 r. 6(1) and to set aside the whole of the offending judgment. The authority of a Court to act *suo motu* to set aside a judgment entered pursuant to its coercive power must, no doubt, be exercised with caution. But it is there to be exercised in appropriate cases; and I am satisfied that the case at hand was indeed a proper case.

On the effect of the entry of such a judgment Mohd Azmi FCJ said in the same case at p. 575:

> There can be no dispute that the procedural irregularity in the failure to serve the statement of claim on the defendants before the default judgment was entered, just as the order to assess damages in the absence of judgment granting damages, had prejudiced the defendants and therefore beyond curability.

The order of court obtained by the plaintiff in such terms is therefore clearly wrong in law and beyond curability.

(ii) Whether the judgment obtained is in default of appearance or in default of defence

As to whether the order of court was obtained in default of appearance as contended by the defendant or in default of defence as contended by the plaintiff it is my view that the words in the judgment relied on by learned counsel for the defendant in support of his argument do not support the stand taken by him. As correctly submitted by learned counsel for the plaintiff they merely mean that judgment was given on the summons in the absence of the defendant.

The confusion relating to the appropriate provision of the RHC pursuant to which the plaintiff filed his summons for judgment could have been avoided if the summons had identified the nature of the judgment sought. In this regard useful reference may be made to *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 where Gopal Sri Ram JCA said at p. 477:

> The summons does not, as I observed very early in the judgment, state any particular rule of court in its intitulement. Now, I think that that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the Court to determine which rule of Court the plaintiff is invoking unless he explicitly specified it? If a defendant and the Court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the Court. It would make a mockery of the principle that there must be no surprise in civil litigation. If the submission of counsel be the law, then it is wrong. But I am firmly of the view that it is not.
>
> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the Court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either

a in its heading or in its body, the statute or rule of court under which the court is being moved; otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

In my opinion the body of a summons for judgment in default of defence under O. 19 r. 7(1) of the RHC should be in the following form:

b Let all parties concerned attend before the Judge in Chambers on ... , the ... day of ... ... , 19 ... , at ... m on the hearing of an application on the part of the Plaintiff for an order that, no defence having been served by the Defendant herein, judgment be entered for the Plaintiff for *(state nature of the application*). The grounds of the application are *(state the grounds)*.

c (see RHC Form No. 62 and *Atkin's Court Forms* 2nd Ed Vol 14 1996 Issue Form No. 47).

This would avoid any form of confusion or embarrassment and will ensure that no one is taken by surprise. It will also prevent a party from shifting d from one rule to another as the occasion demands. It will specify with sufficient clarity the precise jurisdiction or power of the court that is being invoked.

The summons filed by the plaintiff does not appear to be one made under e O. 1 19 r. 7(1) of the RHC as contended by him. It is accompanied by an affidavit affirmed by the plaintiff. That the judgment is in fact based on the affidavit is borne out by the fact that the order of court states that judgment was entered "... setelah membaca afidavit plaintif ...". The judgment obtained by the plaintiff for the assessment of damages appears as a prayer in the summons and not in the statement of claim. In a summons for judgment under f this rule the court cannot receive any evidence and must give judgment according to the pleadings alone (see *Smith v. Buchan* [1888] 58 LT 710; *Young v. Thomas* [1892] 2 Ch 135). It is therefore not necessary on the hearing of the summons or motion for judgment under this rule to prove the case by evidence (*Webster v. Vincent* [1898] 77 LT 167). It must be remembered that g in the words of O. 19 r. 7(1) of the RHC the plaintiff is entitled only to "... such judgment as the plaintiff appears entitled to on his statement of claim." Thus under this rule the judgment that a plaintiff is entitled to is only what he has prayed for in his statement of claim and not what he has stated subsequently in an application. The order of court is therefore not in h accordance with the requirements of O. 19 r. 7(1) of the RHC. I am not suggesting that the filing of an affidavit is fatal to an application for judgment under O. 19 r. 7(1) of the RHC. Normally the only effect of filing an affidavit in such cases is that the costs of any affidavit filed in support of the claim will be disallowed (see *Jones v. Harris* [1887] 55 LT 884). But it assumes i significance in this case as a result of the confusion relating to the precise

rule of court under which the application was made. This is particularly so as there are in fact other rules in the RHC which require an application for judgment to be supported by affidavit. The filing of the affidavit coupled with the statement in para. 4 of the affidavit that the defendant has no defence to the action seems to indicate that the application comes within O. 81 r. 2(1) of the RHC. Thus there is a possibility that the application was made under that rule. However, the minutes of the judgment as required by that rule have not been filed. The fact that an affidavit proving due service of the writ and that a Certificate of Non Appearance had been filed and the further fact that the latter was tendered at the hearing of the summons seems to indicate that the application is one for judgment in default of appearance pursuant to O. 13 of the RHC. It is therefore possible for the order of court to fall within any one of the three rules that I have adverted to. Yet it does not comply strictly with any one of them. Thus it cannot be said with a reasonable degree of certainty that the default judgment was obtained pursuant to O. 19 r. 7(1) of the RHC. The order of court therefore suffers from a fundamental defect as indicated by the authorities that I had referred to earlier. As I said in an earlier part of the judgment, based on high authority, any irregularity in the entry of a default judgment will entitle the defendant *ex debito justitiae* to have it set aside and O. 2 r. 1 of the RHC will not apply to such a judgment. This defect coupled with the judgment obtained for damages to be assessed without first having obtained a judgment for damages renders the judgment irregular and incurable. The defendant is therefore entitled *ex debito justitiae* to have the order of court set aside.

I shall now consider the issues raised by the parties before me though what may be of relevance is only the objection relating to the time period within which an application must be made to set aside a defective judgment. Lapse of time is no bar to a defendant's application to set aside a defective judgment (see *Muniandy a/l Thamba Kaundan & Anor v. D & C Bank Bhd* [1996] 2 CLJ 586; [1996] 1 MLJ 374). Thus the time limit laid down in O. 42 r. 13 of the RHC does not apply where an application is made to set aside such a judgment. I say this for three reasons. Firstly, as laid down in *Badiaddin bin Mohd Mahidin* the setting aside of such a judgment is made in the exercise of the court's inherent jurisdiction without the need to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity. This means that the time constraint enunciated in the rules relating to the setting aside of a judgment will have no application. Secondly, *Syarikat Joo Seng & Anor* is authority for the proposition that a judgment obtained irregularly can be set aside *ex debito justitiae*. The imposition of any time limit is inconsistent with the exercise of such a right. Thirdly, it was held in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37 that such a judgment can be disregarded or ignored. In that event there cannot be any restriction by way

of a time period within which an application should be made to set aside the judgment as it can be ignored even without an order being made to that effect. It is unnecessary to consider the regularity of the affidavit filed by the defendant in support of his application in the light of my finding that the order of court is irregular and incurable. The argument on *res judicata* raised by the plaintiff is also not relevant. In this regard Gopal Sri Ram JCA said in *Badiaddin bin Mohd Mahidin* at p. 429,

> It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. And the procedural branch of the broad and flexible doctrine of estoppel known as *res judicata* finds no place in such circumstances. Neither has the *functus officio* theory, which, upon close examination is merely part and parcel of the doctrine of *res judicata*, any role to play in the case.

What remains for consideration is the correctness of the defence submission that the writ and other documents relating to this case before the judgment was obtained ought to have been served on the solicitors for the defendant in accordance with O. 62 r. 13 of the RHC which reads as follows:

> Where a party after having sued or appeared in person has given notice in writing to the opposite party or his solicitor, through a solicitor, that such solicitor is authorised to act in the cause or matter on his behalf, all writs, notices, pleadings, summonses, orders, warrants, and other documents, proceedings, and written communications which ought to be delivered to or served upon the party on whose behalf the notice is given shall thereafter be delivered to or served upon such solicitor.

It was the contention of the defendant that the documents ought to have been served on his solicitors as the plaintiff knew all along that the defendant was represented by solicitors. The plaintiff contended that the requirement to serve the documents on the defendant's solicitors arises only after a written notice as required by the rule just referred to has been served on him. Such a notice, said the plaintiff, was given only after he had obtained the order of court with the result that the objection raised cannot be sustained. The short answer to this issue is that this rule will become applicable only if the defendant, having entered an appearance, has given a notice in writing to the plaintiff, through his solicitor, that such solicitor is authorised to act on his behalf and that all documents shall thereafter be delivered to or served upon such solicitor. It thus follows that this rule is activated only when a party who had previously acted in person has appointed a solicitor to represent him and has given notice in writing to the opposite party to that effect. In my opinion therefore the defendant is precluded from relying on this rule for two reasons. Firstly, he

has not taken any steps in the proceedings by entering an appearance as specified in the rule for it to become applicable. Secondly, and in any event, he has not given the required notice in writing through his solicitors to the plaintiff. If the defendant had wanted this action to be handled by solicitors before service of the writ on him he ought to have acted under O. 62 r. 1(3) of the RHC which reads as follows:

> No service of writ shall be required where the defendant or his solicitor undertakes in writing to accept service and enter an appearance.

In my opinion the conjunction "or" in the rule should read as "by" in order to correctly portray the intended meaning. Under this rule the need for personal service on a party is dispensed with when his solicitor undertakes to accept service and enter an appearance on his behalf. Order 10 r. 1(2) of the RHC provides that where a defendant's solicitor indorses on the writ a statement that he accepts service of the writ on behalf of that defendant, the writ shall be deemed to have been duly served on that defendant and to have been so served on the date on which the indorsement was made. It is my view that this objection stems from a misconception of the defendant that the plaintiff is obliged to serve the documents on his solicitors merely because he had been involved in litigation with legal representation in a related matter with the plaintiff. That matter has nothing to do with this action as far as legal representation is concerned as the authority of his solicitor in that matter is limited to transacting the business for which the retainer in that case was created. In the premises this objection raised by the defendant has no merits.

In the upshot I allowed the defendant's application with costs.